STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2001
v	No. 219897 Genesee Circuit Court
ROY WAYNE WILLIAMS, Defendant-Appellant.	LC No. 98-002579-FH

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of second-degree criminal sexual assault (CSC), MCL 750.520c(1)(a). Defendant was sentenced to two concurrent sentences of five to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court erred in admitting a statement he made during the course of a scheduled polygraph examination which was ultimately aborted. We disagree.

When considering a motion to suppress evidence, this Court reviews a trial court's factual findings for clear error and reviews a trial court's conclusions of law de novo. MCR 2.613(C); *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

Following a *Walker*[1] hearing, the trial court denied defendant's motion to suppress and found that his statement was voluntary. *People v Wells*, 238 Mich App 383, 386-387; 605 NW2d 374 (2000), provides the following analysis to determine whether a statement is voluntary:

> "The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired . . . .' The line of demarcation 'is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the

[1] 374 Mich 331; 132 NW2d 87 (1965).

confession.'" [Citations omitted.]

The record indicates that defendant was intelligent and well-educated. Defendant does not dispute that he agreed to take a polygraph examination and that he even requested one when the first one failed to take place. Moreover, both defendant and his attorney were given notice of the polygraph and when it was to take place. Nor does defendant dispute that he voluntarily went to the examination without his attorney present and that he signed a written waiver after being read his *Miranda* rights. See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Indeed, it would be contrary to logic for us to conclude that defendant was denied the right to counsel under these circumstances, or to conclude anything other than that defendant waived his right to counsel at the time of the examination. This is clear in light of defense counsel's request for the polygraph at the time of the arrangement and his notice of the scheduled case.

Further, defendant's claim that the polygraph examiner was in his "personal space" for "probably about 15, 20 minutes" and defendant's concession that he was not forced to talk, made it clear that the examiner's behavior came nowhere close to approaching coerciveness. Defendant was not injured, intoxicated, drugged, physically abused, or intimidated. Additionally, any questioning that occurred was not repeated or prolonged, and defendant was not threatened, detained, or deprived of the advice of counsel. Indeed, no "diverse pressures" operated to "sap" defendant's resistance. See *Wells, supra* at 386-387. Based on the totality of the circumstances, we conclude that defendant's statement was voluntary, that he waived his right to counsel, and that the statement was properly admitted at trial. *Id*. at 387; *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000).

Next, defendant asserts that the trial court erred in refusing to quash the information because of unreasonable delay in his arrest and prosecution. We disagree.

"A challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (2000). To merit reversal of a defendant's conviction, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution must have intended to gain a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). The court must balance the defendant's interest in a prompt adjudication of the case against the state's possible interest in delaying prosecution. *Cain, supra* at 108. The defendant bears the burden of coming forward with evidence of prejudice resulting from the delay and then the prosecutor has the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Id*.; *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998).

To be substantial, the prejudice to the defendant must have meaningfully impaired his ability to defend against the charges, such that the outcome of the proceedings was likely affected. *Crear, supra* at 166. An unsupported statement of prejudice by defense counsel is not sufficient. *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982).

Defendant has failed to establish any prejudice. While defendant argues that this prearrest delay prejudiced him because two of his witnesses were unavailable at the time of trial

to testify in his defense, their testimony would have been cumulative as well as irrelevant. Defendant's witness, Daniel Mark Grace, testified that he helped defendant move into defendant's new apartment and that he never observed the two girls. This is virtually the same testimony defendant alleges the missing witnesses would have stated.

Defendant has not shown how the absence of these witnesses prejudiced him. Therefore, the burden does not shift to the prosecution to justify any reason for the delay. See *Adams, supra* at 136-137. Even if the burden had shifted, the need to investigate further, rather than a desire to obtain a tactical advantage, is a proper reason for delay. *Id*. at 140. In this case, which involved allegations of sexual assault that occurred several years earlier and included two extremely young girls, it was reasonable for the police to investigate the claim for several months before arresting defendant. Therefore, the court did not abuse its discretion by denying defendant's motion to dismiss based on prearrest delay.

Defendant also claims that the trial court erred in refusing to quash the information based on the prosecution's failure to specify the date of the offense. We disagree.

A motion to quash is reviewed for an abuse of discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). The statute provides that:

> Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge. [MCL 767.51.]

It is well established that a defendant is, within reasonable bounds, required to take notice that the prosecution may offer proof of a date for the offense charged other than that expressly alleged in the information. *People v Smith*, 58 Mich App 76, 90; 227 NW2d 233 (1975). A time variance contained in an information is permissible unless time is of the essence or an element of the offense. *People v Taylor*, 185 Mich App 1, 7-8; 460 NW2d 582 (1990). "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, an information or bill of particulars will not be deemed deficient for failure to pin down a specific date." *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987) (quoting *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986)).

Time is not an element of second-degree criminal sexual conduct. MCL 750.520c(1)(a). "Time is not of the essence, nor a material element, in a criminal sexual conduct case where a child is involved." *Taylor, supra* at 8. Furthermore, MCL 767.45(1)(b) only requires that the information contain the "time of the offense as near as may be" and also provides that "[n]o variance as to time shall be fatal unless time is of the essence of the offense."

The proper inquiry is whether the information sufficiently apprised defendant of the charges against him. See *People v Mast*, 126 Mich App 658, 661-662; 337 NW2d 619; *People v Mast (On Rehearing)* 128 Mich App 613; 341 NW2d 117 (1983). The record reveals that defendant was sufficiently apprised of the charges against him by the May 8, 1998, preliminary examination hearing. At this hearing, the prosecution established that the alleged date of the occurrence was on or about the time that defendant moved into his apartment in March 1994. Consequently, the time variance contained in the information was not grounds for reversal.

Next, defendant argues that at the preliminary examination, the court "crossed the threshold of judicial impartiality in taking over the function of investigator and prosecutor." We disagree. This Court reviews the decision of the examining magistrate for an abuse of discretion. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

Defendant relies on *People v Redfern*, 71 Mich App 452; 248 NW2d 582 (1976), and various other case, where the trial court, acting in front of a jury, overstepped its boundaries and abandoned its mantle of impartiality. Those cases are not applicable here, as there was no jury present at the preliminary examination and thus no risk of improperly influencing the jury's decision. A magistrate has broad discretion, and indeed an obligation, to determine whether an offense was committed by the accused and must conduct an examination on any other matter connected with the charge. See *People v Gonzalez*, 214 Mich App 513, 516-517; 543 NW2d 354 (1995). It was perfectly appropriate for the court to adjourn the preliminary examination for three days in order to give the prosecution an opportunity to pinpoint the time frame of the offense. If anything, the court's adjournment ensured that defendant had adequate notice of the charges against him and ensured that there was no statute of limitations problem. The court found that it would "behoove" both parties to have the date specified and we agree. Thus, the court did not abuse its discretion.

Lastly, defendant argues that the trial court erred in not granting his motion to excuse a particular juror for cause. Assuming, arguendo, that the court should have excused the juror for cause, defendant has failed to establish any actionable prejudice.

A court's decision about whether to excuse a juror for cause is reviewed for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 251; 445 NW2d 115 (1989). In *Poet*, our Supreme Court explained that the fact that a party is forced to use a peremptory challenge to excuse a juror, who should have been excused for cause, is not in and of itself sufficient to show "actionable prejudice." *Id*. at 241. *Poet* set forth the following four-pronged test:

> Accordingly, in the interest of requiring an independent and objective manifestation of actionable prejudice, we hold that in order for a party to seek relief in this instance, there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Id*.]

This test is applicable to criminal cases as well as civil cases. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Defendant never demonstrated that he wanted to excuse another subsequently summoned juror. In fact, defendant expressed his satisfaction with the jury and said that he would not have used another peremptory challenge if he had one. It is insufficient for defendant to simply assert on appeal that he "in fact exhausted his peremptory challenges." Clearly, defendant has not demonstrated any actionable prejudice.

Defendant further claims that when a juror became emotional during voir dire questioning, she tainted the entire panel. Absent a more specific explanation for this assertion, defendant's claim falls short of establishing any actionable prejudice. Similarly, defendant's unsupported contention that he was not afforded a fair and impartial jury because the court reporter, who transcribed the proceedings from a video tape and found some of the jurors' answers to questions during voir dire "inaudible," is meritless. Defense counsel was present during voir dire and failed to raise a specific issue with any particular juror. Thus, having failed to raise any issue during trial, defendant's assertion is based on mere speculation.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper